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NO. 96-1578

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

HON. THOMAS R. PHILLIPS, et al.,

Petitioners,

vs.

WASHINGTON LEGAL FOUNDATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Texas Equal Access to Justice Program[1], like the 50 other similar programs throughout the country (herein collectively referred to as "IOLTA" programs) operates on the premise that nominal sums of money, or short term

[1]Consents from all parties for the filing of this brief have been filed with the Clerk of this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation and submission of this brief.

deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the administration of justice and delivery of legal services to the poor.

The IOLTA programs authorize attorneys to pool nominal or short term client funds, which before IOLTA were required by the applicable rules of professional conduct, and by then-existing banking law restrictions, to be deposited in interest-free checking (demand) accounts, and deposit them in negotiable order of withdrawal ("NOW ") or similar accounts. The interest generated only because of the aggregation of the funds is then used to support legal services to the poor and other law-related public purposes. The hundreds of millions of dollars which have been raised in this fashion, at no cost to any client, provide an irreplaceable source of funding for civil legal aid to the poor.

The Fifth Circuit's decision, if upheld, would destroy a program which has justifiably deserved the plaudits it has received from the bench, the bar, the media, and the public. The eighty-four (84) *amici curiae,* whose names are set out in the Addendum to this Brief, are all organizations vitally interested in the continued growth and success of IOLTA programs as a mechanism for bringing the concept of equal justice under the law a step closer to reality. The forty (40) participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The forty (40) participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes. The other *amici curiae* are all organizations vitally interested in furthering the principle of equal justice under law for all.

Each participating *amicus* believes that IOLTA is critically important to ensuring that those in need of legal

services do not go without. Their participation attests to the nationwide acceptance of the IOLTA concept by a broadly representative sample of the legal profession. Firmly believing that IOLTA programs are in the best tradition of the legal profession, *amici curiae* fully support the Justices of the Texas Supreme Court and the Texas Equal Access to Justice Foundation in urging that the decision of the Fifth Circuit be reversed.

ARGUMENT

INTEREST ON LAWYER TRUST ACCOUNT PROGRAMS, WHICH DO NOT INJURE CLIENTS, EVEN TO THE EXTENT OF A SINGLE PENNY, DO NOT TAKE ANY PROPERTY TO WHICH ANY CLIENT HAS A LEGITIMATE CLAIM OF ENTITLEMENT

A. The IOLTA Premise

Attorneys must "hold property of clients or third parties that is in a lawyer's possession in connection with a representation separate from a lawyer's own property." Rule 1.15, Model Rules of Professional Conduct (ABA 1995). Prior to IOLTA, to meet these responsibilities attorneys held most client funds in commingled, non-interest bearing demand (checking) accounts, usually called attorney trust accounts. Generally, without regard to the amount of the funds, or the length of time the funds were expected to be held by the attorney, the client was deprived of the ability to earn interest as a result of the combination of the mandate that an attorney place the funds in an account which would permit the immediate return of the funds on request, *i.e.,* a demand account, and banking law restrictions which barred payment of interest on demand accounts.

With IOLTA, nominal funds or funds expected to be held for a short period of time, that is, funds which on their own, because of very real banking and economic constraints are not capable of producing income net of expenses, are placed in commingled, interest bearing NOW accounts, and the interest generated, after bank service charges, is used to fund legal aid programs, pro bono delivery systems, and other, law-related public service projects. As in Texas, the general process is for the attorney's bank, after deducting service charges, to remit the net interest earned directly to an IOLTA administering agency, such as the Texas Equal Access to Justice Program, which in turn makes grants to support administration of justice projects, the delivery of pro bono pro services, and legal aid programs.

To understand IOLTA, and why it does not take the property of any client, it is necessary to examine (1) the rules of professional conduct which in all states compel attorneys to place client and third party funds in accounts separate and apart from accounts containing funds belonging to the attorney, and to return the funds immediately upon request, (2) the regulation of banking, and of the ability of a depositor to earn interest, and (3) the economic realities of opening, administering, and disbursing funds which have been deposited in an interest-bearing account.

IOLTA establishes a unique method of financing civil legal aid to the poor by taking advantage of these factors and harnessing funds that, before adoption of the program, were neither used nor capable of being used to produce income for a client. Unlike the First and Eleventh Circuits, and the 45 state supreme courts which have authorized and adopted similar programs, the Fifth Circuit refused to recognize that IOLTA combines lawyer trust account mandates, banking law restrictions, and economic realities, to produce income where, previously, there was no income.

IOLTA is simplicity itself. Attorneys routinely receive client and third-party funds which they must hold in their attorney trust accounts. If the funds are large in amount or expected to be held for a long period of time, IOLTA rules in all the states preclude the placing of such potentially productive funds in an IOLTA account. For productive funds, the attorney's ethical duty is to consult with the client and determine where to place the funds so that the client may benefit from the earning power of the funds.[2] IOLTA does not change this time-honored practice. To the contrary, it reinforces the principle that where client funds are capable of earning income net of expenses, the attorney should place the funds in an interest bearing account for the benefit of the client. ABA *Annotated Model Rules of Professional Conduct* 236 (3d ed. 1996). *See also* A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982); *Petition of Minnesota State Bar Association*, 332 N.W.2d 151, 157 (Minn. 1982).

Often, however, lawyers hold funds in amounts which are very small or expected to be held for a very short period of time. As a matter of economic reality, it is simply impossible to invest such funds productively for the benefit of the client. That is because bank service charges, as well as bank rules limiting the payment of interest on accounts not open as of the end of a month, or for a specific time period, all preclude the possibility of earning interest on many client trust account deposits. Likewise, the wide range of costs that a lawyer would incur, including (1) the time to obtain tax identification information, (2) the time to determine whether investment is warranted, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation of tax reporting forms, and (6)

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[2]Absent specific and informed consent, the attorney may not retain the interest earned on client funds. *The Florida Bar v. Dancu*, 490 So.2d 40 (Fla. 1986).

the time required to close a separate, income producing account, all preclude the earning of net income on the funds of many clients. See A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, *Report to the Board of Governors*, 22-24 (July 1982).

With IOLTA, all economically unproductive client funds are pooled by the attorney in an interest-bearing NOW account. Interest net of expenses is earned only because of the pooling. As Respondents Mazzone and Summers acknowledged before the district court, they lose nothing because of IOLTA.

A few brief examples of the nonproductive funds that are placed in an attorney's IOLTA trust account will demonstrate why the client suffers no injury, not even to the extent of a penny.

1. **Cost Deposits**. A client involved in litigation is often required to provide costs, such as filing and service of process fees, in advance of actual disbursement. In some, but not all states, those funds must be placed in the lawyer's trust account. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The facts in *Cone v. State Bar*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 487 U.S. 917 (1987), are typical. The client gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Moreover, it is clear that, as a practical matter, $13.75 is inherently incapable of being put to productive use for an individual. The approximately 3¢ per month in earnings on $13.75, at current NOW

account rates,[3] would not offset bank service charges, let alone the costs incurred by an attorney to administer a separate interest-bearing account.

2. **Real Estate Escrows**. An attorney representing the seller of a small piece of property receives $500 to be held in escrow. At closing, which may take place anywhere from thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The gross interest earned by the deposit, $1.42 per month, would not justify the time and expense required to set up a separate NOW account.

3. **Real Estate Closings.** In a similar fashion, an attorney may receive the funds necessary for a residential real estate closing by wire a day in advance, thereby producing a one day accrual of interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. There is no practical way to make such short term funds productive for the client. However, when placed in an IOLTA account, interest can be earned on funds held for periods as short as a day or two.

4. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has accepted the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. For example, assume $50,000 is credited to an attorney's trust account on a

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[3]Rates vary from bank to bank and place to place. The rate used here, 2.5%, is greater than generally available. For example, state-wide in Florida, the average rate paid on IOLTA NOW accounts is only 1.43%.

Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. If a separate account were opened to accomplish this receipt and disbursement, no interest would be earned because of the short period of time during which the account was active. However, when the funds are placed into an IOLTA account for five days, they can produce income of $17.12. Does the client have any expectation of receiving interest earned by the settlement amount during these few days? Clearly not. Indeed, there is no practical way to open a separate account to capture the $17.12 that can be earned by the IOLTA account.

IOLTA programs operate according to three models: (1) voluntary (the attorney decides whether to participate), (2) opt-out (the attorney must specifically advise the state IOLTA agency that the attorney will not participate), or (3) mandatory (all attorneys must participate).[4] The different models affect the attorney, but not the client. In all cases, if the attorney participates, the attorney will place all nominal or short term deposits in the attorney's IOLTA account. Client choice is not possible because of the potential tax consequences resulting from the assignment of income doctrine. *See Matter of Interest on Trust Accounts*, 402 So.2d 389, 390-91 (Fla. 1981). However, IOLTA does not alter in any way the attorney client relationship. Nor does it compel any client to give, or any attorney to accept, funds for deposit in an IOLTA account.

While there are minor variations from state to state, the essential premise remains constant: that nominal or short

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[4]There are 4 voluntary programs, 20 opt-out programs, and 27 mandatory programs. ABA/BNA *Lawyers' Manual on Professional Conduct* § 45:202-05 (1997).

term client funds, which on their own are incapable of producing income net of expenses, can be aggregated to produce income where, in the absence of IOLTA, there would be no income. In every state, attorneys must in good faith determine which client funds should be placed at interest for the benefit of the client and which client funds should be placed in an IOLTA account. Rule 5-1.1(e)(7), Rules Regulating The Florida Bar (1997), is typical. It provides that:

> *Determination of Nominal or Short-Term Funds.* The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer shall consider such factors as:
>
> (A) the amount of a client's or third person's funds to be held by the lawyer or law firm;
>
> (B) the period of time such funds are expected to be held;
>
> (C) the likelihood of delay in the relevant transaction(s) or proceeding(s);
>
> (D) the cost to the lawyer or law firm of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and
>
> (E) minimum balance requirements and/or service charges or fees imposed by the financial institution.

Several states have incorporated a benchmark into their IOLTA rule; if the funds at the time of deposit are expected

to produce more than $50.00 in interest, they cannot be deemed nominal or short term.[5] See, e.g., Opinion R-7, Committee on Professional and Judicial Ethics of the State Bar of Michigan, ABA/BNA, *Lawyers' Manual on Professional Conduct* § 904:4707 (1990); Md. Code Ann., Bus, Occ. & Prof. § 10-303(b) (1996). *See also,* Machen, *I-O-L-T-A "What Is It/How Does It Work"?*, 1983 Md. B.J. 6, 9.

Other states have a provision in their IOLTA rule which provides, as does Delaware's, that: "A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of client funds." DR9-102(C)(4), Delaware Rules of Professional Conduct. If circumstances have changed, the lawyer should remove the funds from the IOLTA account and place them at interest for the benefit of the client. Opinion 87-2, Ethics Committee of the Massachusetts Bar Association, ABA/BNA, *Lawyers' Manual on Professional Conduct* § 901:4602 (1987).[6]

IOLTA's mechanism for generating income to provide critically important public services, while fully protecting the legitimate expectations of clients to benefit from funds capable of producing income net of expenses, accounts for IOLTA's nationwide acceptance. While the public benefits, clients suffer no loss because their nominal or short term deposits produce income net of expenses only because they are pooled in an IOLTA account. And, as the legal profes-

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[5]For example, a $1,000 deposit for costs will require two years to earn the benchmark amount.

[6]To correct errors, most states have provisions for the IOLTA administering agency to refund interest when it is determined that the funds should have been placed at interest for the benefit of the client. See, e.g., DR9-102(C)(4), Oklahoma Rules of Professional Conduct.

sion fully recognizes, IOLTA is a vital component for meeting the critical need for additional resources to improve the justice system.

B. IOLTA's Nationwide Acceptance

Today, all fifty states and the District of Columbia have adopted IOLTA programs. ABA/BNA, *Lawyers' Manual on Professional Conduct* § 45:201 (1997). Collectively, the programs have raised hundreds of millions of dollars, primarily to support the provision of legal aid to the poor. With the cuts in federally funded legal services programs, IOLTA has become even more vital; it has become the second largest source of funds for legal aid programs.

The IOLTA concept originated in Australia. It then spread to Canada, where some of the IOLTA generated funds were first used for legal aid. England & Carlisle, *History of Interest on Trust Accounts Program*, 56 Fla. B.J. 101 (1982). Florida was the first state to authorize an IOLTA program, *In re Interest on Trust Accounts*, 356 So.2d 799 (Fla. 1978). After NOW accounts became available,[7] and tax issues were resolved,[8] implementation commenced in 1981. *Matter of Interest on Trust Accounts*, *supra*, 402 So.2d 389.

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[7]NOW accounts were authorized by The Consumer Checking Account Equity Act of 1980, Title III of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303, 94 Stat. 146 (1980), codified at 12 U.S.C. § 1832(a) (1994).

[8]Revenue Ruling 81-209, 1981-2 C.B. 16, permitted the Florida IOLTA program to go forward without adverse tax consequences to either client or attorney so long as all nominal or short term client funds were placed into the IOLTA account.

In a remarkably few years, every state and the District of Columbia adopted an IOLTA program. The highest courts of seven states, in adopting IOLTA programs for their respective states, have expressly held that IOLTA does not violate the Fifth Amendment. *Matter of Interest on Trust Accounts*, *supra*, 402 So.2d 389; *Petition of Minnesota State Bar Association*, *supra*, 332 N.W.2d 151; *Petition of New Hampshire Bar Association*, 122 N.H. 971, 453 A.2d 1258 (1982); *Matter of Interest on Lawyers' Trust Acc.*, 672 P.2d 406 (Utah 1983); *In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA*, 102 Wash.2d 1101 (1984); *In the Matter of Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984), *rev'g*, 279 Ark. 84, 648 S.W.2d 480 (1983); *Petition by Massachusetts Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985).

In addition, like Texas, thirty-seven other state supreme courts and the District of Columbia Court of Appeals have adopted IOLTA programs without formal opinion, although in each jurisdiction the Fifth Amendment was raised as a barrier to adoption of the program.[9] IOLTA programs have been established by legislation in five states, California, Connecticut, Maryland, New York and Ohio. The American

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[9]The Supreme Courts of Arkansas, Maine, Michigan and North Carolina initially rejected but subsequently approved IOLTA programs. The Supreme Court of Indiana initially refused to adopt an IOLTA program, primarily on the grounds that it was unethical. *Matter of Indiana State Bar*, 550 N.E.2d 311 (Ind. 1990). Later, it struck down legislation adopting an IOLTA program on separation of powers grounds. *Matter of Public Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990). Thereafter, in October, 1993, the Indiana Supreme Court, acting pursuant to its rulemaking power, authorized an IOLTA program, which is currently in the implementation stage.

Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

Prior to the ruling of the Fifth Circuit, no court in an adversary proceeding had ever rejected an IOLTA program. In an identical challenge brought by the Washington Legal Foundation, Massachusetts' IOLTA program was upheld. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993). The Florida program was upheld in *Cone v. State Bar*, *supra*, 819 F.2d 1002. The California IOLTA program was upheld in *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (4th Dist. 1984), *cert. denied sub nom. Chapman v. State Bar of California*, 474 U.S. 848 (1985). In *Ronwin v. Supreme Court of Iowa*, (No. 84-1641), *cert. denied*, 471 U.S. 1101 (1985), this Court refused to review the Iowa Supreme Court's rulemaking adoption of an IOLTA program.

The decision of the Fifth Circuit stands in sharp contrast to the literally hundreds of judges from 45 states, the District of Columbia, and the First and Eleventh Circuits, who have concluded that the Fifth Amendment is not a bar to implementation of an IOLTA program.

C. Absence of a Property Interest

The critical constitutional question raised by IOLTA programs is whether using clients' monies, which lawyers hold in aggregated trust accounts, to produce income for public services, constitutes a taking of property without just compensation contrary to the dictates of the Fifth Amendment. Those who object to IOLTA programs rely on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) for the over-broad proposition that the owner of a fund possesses a vested property right to the earnings of that fund

in any and all circumstances, notwithstanding the economic realities which, as Respondents admit, preclude the earning of any income net of expenses on funds deposited in an IOLTA account. *Amici curiae*, on the other hand, submit that no property is taken because IOLTA creates income which would not otherwise accrue to the benefit of any client.

In deciding that IOLTA offends the Fifth Amendment, the Fifth Circuit did not meaningfully address the issue of whether the Respondents have any property interest in the income created only because of the IOLTA program. It failed to apply the holding of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), that in order to have a property interest, the claimant must be able to identify a legitimate claim of entitlement. It certainly overlooked the inherent finding of the Texas Supreme Court when it adopted the Texas Equal Access to Justice Program that no client had a property interest in the income generated because only the aggregation of nominal and short term deposits could produce income net of expenses.[10] And, in a similar fashion, it overlooked the decisions of the 43 other state supreme courts which concluded, either implicitly or explicitly, that no client has a legitimate claim of entitlement to the interest generated only because of the IOLTA program.

A claim of entitlement to all interest earned on a bank account does not enjoy a great deal of historical support. At common law it was unlawful to recover interest on money loaned. *National Bank v. Mechanics' Nat'l Bank*, 94 U.S. (4 Otto.) 437 (1877). The general rule is that the "right to recover interest upon the loan or forbearance of money" is

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[10]The Fifth Circuit ignored the well-established rule of law that a state court's interpretation of its own law is binding on the federal courts. *New York v. Ferber*, 458 U.S. 747, 767 (1982).

purely statutory. *Frazer, Executor v. Boss*, 66 Ind. 1 (1879). Thus, absent statute or contract, banks have no obligation to pay interest on deposits. *Jones v. Mallory*, 22 Conn. 386 (1853).[11]

Early American banks were established for the purpose of providing "safe depositories for the funds of capitalists."[12] Beginning in 1781 banks in the modern sense were established in ever increasing numbers.[13] Still, the suggestion in 1810 that the First Bank of the United States pay interest on government deposits was considered a radical departure from accepted banking practices.[14] Even as late as 1834, it was thought the purpose of making a bank deposit was solely for safekeeping.[15]

As the banking industry evolved, competition for deposits grew. To attract new deposits, the payment of interest on demand deposits became widespread.[16] Due to the

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[11]For a more extensive discussion, see Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U. Fla. L. Rev. 674, 681-91 (1984).

[12]1 F. Redlich, *The Molding of American Banking: Men and Ideas* 13-14 (Johnson Reprint 1968).

[13]B. Hammond, *Banks and Politics in America: From the Revolution to the Civil War* 71-72 (1957).

[14]1 F. Redlich, *supra*, at 14 n. 103.

[15]*Id.* at 13 n. 99.

[16]*Id.* Vol. 2, at 6. Before 1840, it was unusual for interest to be paid on demand deposits of individuals,

(continued...)

financial panic of 1857, forty-two New York City banks agreed among themselves to cease paying interest, soon followed by banks elsewhere.[17] However, the pressure of new competition after the Civil War resulted in the resumption of interest payments.[18] By 1884, the payment of interest on demand deposits had become almost universal among banks.[19]

The bank failures of the Great Depression resulted in a complete overhaul of banking law and far more extensive federal regulation. Section 11(b) of the Banking Act of 1933 barred commercial banks from paying interest on demand deposits and authorized the Federal Reserve Board to limit, by regulation, the rate of interest payable on time and savings deposits.[20] Corporations could only use time deposits

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[16](...continued)
although interest was often paid on demand deposits of other banks, corporations, and governmental entities. *Id.* at 53.

[17]1 F. Redlich, *supra*, at 7. By 1860, virtually all of New York City banks had stopped paying interest on deposits. A. Cox, *Regulation of Interest Rates on Bank Deposits* 3 (1966).

[18]*Id.*

[19]J. Knox, *A History of Banking in the United States* 187 (1900).

[20]Banking Act of 1933, ch. 89, § 11(b), Pub. L. No. 66, 48 Stat. 181 (1933). That section provided in relevant part that: "No member bank shall directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand." In *Steingut v. Guaranty Trust Co.*, 161 F.2d 571 (2d Cir.), *cert. denied*, 332 U.S. 753, 807
(continued...)

to earn interest, but those funds were not available on demand. Did the federally imposed banking restrictions work a taking by effecting a transfer of the earning power of funds which — like attorney trust account funds — needed to be placed in demand accounts? The answer would have to be "yes" if IOLTA is deemed a taking. Such a novel claim would turn taking's jurisprudence on its head.

The ability to earn interest on what, for all practical purposes amounted to a demand account, commenced only in June of 1972, when the Consumers Savings Bank of Worcester, Massachusetts, offered the first savings accounts that permitted a "Negotiable Order of Withdrawal" (NOW accounts).[21] However, it was not until December 31, 1980, that NOW accounts became available nationwide,[22] thereby permitting the Florida IOLTA program to begin. Lawyers could convert their interest-free trust accounts into interest-paying NOW accounts. The economic benefits gained were reallocated from financial institutions to the public. From the client's perspective, nothing changed.

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[20](...continued)
(1947), the court held that § 11(b) required financial institutions to stop paying interest on pre-1933 demand deposits, even where the interest was being paid pursuant to an express contract between the bank and the depositor.

[21]D. Crane & M. Riley, *NOW Accounts: Strategies for Financial Institutions* 3 (1980).

[22]The Consumer Checking Account Equity Act of 1980, Title III of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303, 94 Stat. 146 (1980), codified at 12 U.S.C. § 1832(a) (1994).

NOW accounts are not available to all depositors. Instead, NOW accounts must consist "solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit," or of funds belonging to public entities.[23] NOW accounts furnish the only basis for interest-paying checking accounts. Restrictions on NOW account usage, however, bar all profit-making clients, other than sole proprietors, from utilizing them. The IOLTA administering agency, because it is a qualified charitable organization, is able to receive the income from the NOW account.[24]

Prior to IOLTA, most client funds were deposited in aggregated, interest-free checking (demand) accounts.[25] The use of demand accounts was necessary so that the attorney could return the client's money immediately upon request. Rule 1.15, *Model Rules of Professional Conduct* (ABA 1983). Moreover, because the attorney cannot personally benefit from any earnings generated by the trust account, even to the extent of using the earnings to offset bank service charges,[26] only banks benefited from the funds placed in an

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[23]12 U.S.C. § 1832(a) (1994).

[24]Middlebrooks, *The Interest on Trust Accounts Program, Mechanics of Its Operation*, 56 Fla. B.J. 115 (1982).

[25]Generally, a lawyer was under no obligation to place client funds in an interest-bearing account. ABA *Annotated Model Rules of Professional Conduct* 236 (3d ed. 1996).

[26]ABA Comm. on Ethics & Professional Responsibility, Informal Op. 545 (1962); ABA Comm. on (continued...)

attorney's trust account. Thus, if there is merit to Respondents' argument, it must also follow that the previous combination of attorney and banking restrictions worked a similar taking, although in favor of banks rather than the provision of legal aid to the poor.

In short, history shows that banking barriers, coupled with attorney trust account mandates, prevented funds placed in attorney trust accounts from being made productive for the client. Now, with many of the banking barriers removed, the transaction costs incurred by attorneys and financial institutions still form a very real barrier to making nominal or short term deposits productive for the client. The unique character of the IOLTA program rests in part on its ability to overcome both barriers. The economic barrier is overcome only because the aggregation of funds can produce income net of expenses which non-aggregated funds are unable to generate. Additionally, by providing that income produced by a NOW account belongs to a non-profit charitable corporation or a public entity, the banking barrier is overcome. It is accurate to say that without IOLTA there would be no net income in the first place.

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[26](...continued)
Ethics & Professional Responsibility, Informal Op. 991 (1967). Some attorneys reaped a benefit from their client's funds by way of reduced cost banking services, lower cost loans, and other free or reduced cost services. The ethical propriety of that practice is doubtful, see Opinion 88-20, Committee on Professional Status of the Bar Association of Nassau County, N.Y., ABA/BNA *Lawyers' Manual on Professional Conduct* §901:6262 (4/20/88), but has never been directly addressed by an ABA or state-level ethics opinion.

It is not enough for IOLTA opponents to say that earnings follow principal. One must also look to all the limitations that accompany a claim to such earnings. The distinction between net and gross income is one such limitation. Were an attorney trust account actually a trust arrangement, nobody would suggest that the beneficiary would be entitled to the income without the trustee first deducting the cost of producing that income.[27] Likewise, the restrictions on who can use a NOW account constitute another limitation. Because of the costs involved, as well as the restrictions imposed by banking laws and rules of professional conduct, the claim of the owner of a nominal or short term deposit to the interest earned by that deposit does not qualify as property under the *Roth* constitutional definition. Certainly, there are no "rules or mutually explicit understandings"[28] that the client will receive the interest. The time-honored practice has been directly to the contrary.

Thus, the combination of the type of the funds typically placed in attorneys' trust accounts (see the discussion of typical deposits, *supra*, beginning at p. 6), the restrictions placed on attorneys' handling of those funds, the evolution of banking law, and the economic realities of nominal or short term deposits, all preclude the conclusion that a client has a legitimate claim of entitlement to interest generated only because of the IOLTA program.

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[27]3 A. Scott, *The Law of Trusts* §§ 242, 244 (4th ed 1988 & Supp. 1996).

[28]*Board of Regents, supra*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

D. Absence of a Taking

Having found a property interest, despite the lack of Texas law establishing any entitlement in the circumstances herein presented, the Fifth Circuit overlooked the multifactor balancing test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with distinct investment-backed expectations. Yet, *Penn Central* leads to the inevitable conclusion that IOLTA programs do not take the client's property. Or as Justice Peckham put it nearly a century ago, if a claimant is "not injured to the extent of a penny ... his abstract rights are unimportant." *Hooker v. Burr*, 194 U.S. 415, 419 (1904).

Because established takings doctrine requires at least some loss, and because Respondents admit that they suffered no loss due to the operation of the Texas IOLTA program, their Fifth Amendment claim is not well-founded.[29] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, *supra*, 449 U.S. 155 is not to the contrary. The fund at issue in *Webb's*, more than $1.8 million, clearly could, and did, produce income net of expenses. *Webb's* certainly does not preclude the IOLTA

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[29]If IOLTA is deemed a taking, those clients who object to having their funds deposited in an IOLTA account would be entitled to "just compensation." As Judge Benavides said in dissenting from the Fifth Circuit's failure to grant rehearing en banc, "[b]ecause the fair market value of the earnings of IOLTA-eligible funds is $0, the client would be entitled to nothing." *Washington Legal Foundation v. Texas Equal Access*, 94 F.3d 996 (5th Cir. 1996), *reh. and reh. en banc denied*, 106 F.3d 640, 644 (5th Cir. 1997)(Benavides, J., dissenting).

proponent's calculus that recognizes the real cost of producing that net income.

The Eleventh Circuit fully understood the absence of net income-producing ability on the part of a nominal or short term deposit when it rejected a taking claim, premised on the rule of *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809), that "interest goes with the principle, as the fruit with the tree," by noting that the "illustration necessarily assumed the existence of a fruit-bearing tree." *Cone*, *supra*, 819 F.2d at 1004. Absent at least some real loss, no caselaw from this or any other court, with the exception of the Fifth Circuit, turns regulation into a taking.

CONCLUSION

Respondent Mazzone admits that the client funds he places in his IOLTA account "cannot practicably be placed into separate interest-bearing accounts, because the additional costs of establishing and maintaining such accounts usually would exceed any interest I could earn for my clients."[30] Likewise, Respondent Summers admits that his funds were placed in an IOLTA account because his attorney told him that "the cost of establishing and administering a separate account ... most likely would exceed any interest that could be earned on those funds."[31]

This lack of income-producing ability is the core concept supporting IOLTA. No client has a property interest in the interest income generated only because of IOLTA.

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[30]Affidavit of Michael J. Mazzone in Support of Respondents' Motion for Summary Judgment, at ¶ 4.

[31]Affidavit of William R. Summers in Support of Respondents' Motion for Summary Judgment, at ¶ 6.

Because no client is injured, even to the extent of a penny, *amici curiae* urge that the Fifth Circuit be reversed.

If IOLTA is abolished, financial institutions will receive a windfall by again benefiting from the use of interest-free money, programs to improve the administration of justice and the delivery of pro bono services will go unfunded, and a large percentage of the poor currently served by legal aid programs will again be denied access to the justice system. Yet clients with nominal or short-term deposits will find their position totally unchanged.

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ADDENDUM

THE *AMICI CURIAE*

Alabama Law Foundation, Inc.
Alabama State Bar
Arizona Bar Foundation
State Bar of Arizona
Arkansas Bar Association
Arkansas IOLTA Foundation, Inc.
The Legal Services Trust Fund Commission of the State Bar of California
The State Bar of California
Colorado Bar Association
Colorado Lawyers Trust Account Foundation
Connecticut Bar Association
The Connecticut Bar Foundation
The Florida Bar
The Florida Bar Foundation
Georgia Bar Foundation
Hawaii Justice Foundation
Hawaii State Bar Association
Idaho Law Foundation, Inc.
Idaho State Bar
Lawyers Trust Fund of Illinois
Illinois State Bar Association
Indiana State Bar Association
Lawyer Trust Account Commission of the Supreme Court of Iowa
The Iowa State Bar Association
Kansas Bar Foundation
Kentucky IOLTA Fund
Louisiana Bar Foundation
Louisiana State Bar Association
Maine Bar Foundation
Maine State Bar Association
Maryland Legal Services Corporation

Maryland State Bar Association
State Bar of Michigan
Michigan State Bar Foundation
Minnesota State Bar Association
The Mississippi Bar Foundation
The Missouri Bar
Missouri Lawyer Trust Account Foundation
Montana Law Foundation
State Bar of Montana
National Association of IOLTA Programs, Inc.
National Legal Aid and Defender Association
Nebraska Lawyers Trust Account Foundation
Nebraska State Bar Association
Nevada Law Foundation
State Bar of Nevada
New Hampshire Bar Association
New Hampshire Bar Foundation
The IOLTA Fund of the Bar of New Jersey
New Jersey State Bar Association
New Jersey State Bar Foundation
State Bar of New Mexico
New Mexico Bar Foundation
IOLTA Fund of the State of New York
New York State Bar Association
North Carolina Bar Association
North Carolina Association of Black Lawyers
North Carolina State Bar Plan for IOLTA
Ohio Legal Assistance Foundation
Ohio State Bar Association
Oklahoma Bar Association
Oklahoma Bar Foundation, Inc.
Oregon Law Foundation
Oregon State Bar
Pennsylvania Bar Association
Lawyer Trust Account Board (Pennsylvania)
Philadelphia Bar Association
Rhode Island Bar Association

Rhode Island Bar Foundation
South Carolina Bar
South Carolina Bar Foundation
State Bar of South Dakota
Tennessee Bar Foundation
Tennessee Bar Association
Vermont Bar Association
Vermont Bar Foundation
The Virginia Bar Association
Legal Services Corporation of Virginia
Legal Foundation of Washington
Washington State Bar Association
King County Bar Association (Washington)
West Virginia Bar Foundation
West Virginia State Bar
Wisconsin Trust Account Foundation, Inc.